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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
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EXAMINER

MCCLAIN-COLEMAN, TYNESHA L.

ART UNIT

PAPER NUMBER

1789

NOTIFICATION DATE

DELIVERY MODE

12/13/2010

ELECTRONIC

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Notice of the Office communication was sent electronically on above-indicated "Notification Date" to the following e-mail address(es):

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Office Action Summary	Application No. 10/530,492	Applicant(s) POURU ET AL.	
	Examiner TYNESHA MCCLAIN-COLEMAN	Art Unit 1789	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 15 October 2010.
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1-14 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 1-14 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☒ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☒ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
 2. ☐ Certified copies of the priority documents have been received in Application No. _____.
 3. ☒ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- | | |
|---|---|
| 1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892) | 4) <input type="checkbox"/> Interview Summary (PTO-413)
Paper No(s)/Mail Date. _____ |
| 2) <input type="checkbox"/> Notice of Draftperson's Patent Drawing Review (PTO-948) | 5) <input type="checkbox"/> Notice of Informal Patent Application |
| 3) <input checked="" type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08)
Paper No(s)/Mail Date <u>20101015</u> . | 6) <input type="checkbox"/> Other: _____ |

DETAILED ACTION

1. The amendment filed October 15, 2010 is acknowledged. Claims 1-14 are pending in the application.

Claim Rejections - 35 USC § 103

2. The text of those sections of Title 35, U.S. Code not included in this action can be found in a prior Office action.

3. This application currently names joint inventors. In considering patentability of the claims under 35 U.S.C. 103(a), the examiner presumes that the subject matter of the various claims was commonly owned at the time any inventions covered therein were made absent any evidence to the contrary. Applicant is advised of the obligation under 37 CFR 1.56 to point out the inventor and invention dates of each claim that was not commonly owned at the time a later invention was made in order for the examiner to consider the applicability of 35 U.S.C. 103(c) and potential 35 U.S.C. 102(e), (f) or (g) prior art under 35 U.S.C. 103(a).

4. Claims 1-14 are rejected under 35 U.S.C. 103(a) as being unpatentable over *Wester et al.* WO02/082929 (hereinafter "*Wester*") in view of *Plank et al.* US 2003/0235643 A1 (hereinafter "*Plank*").

5. With respect to claims 1, 4, 10, 11, and 14, *Wester* discloses incorporating fatty acid esters of plant sterols into food products such as breakfast cereals (page 5, lines 24-27 and page 6, lines 2-4). The term plant sterol refers to both sterols and saturated sterols i.e. stanols either in their free form or esterified with e.g. fatty acids (page 5, lines

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3-4). One example of the composition included fruit muesli containing stanol ester and β -glucan (Example 12, page 20). The fruit muesli contained 2.5g of plant sterol ester, and the total weight of the composition was 60g (including the oat flakes, oat bran concentrate, plant stanol ester, oat bran, sugar, rice crispy, vegetable oil, syrup, salt, and fruit mixture). Thus, the product contained about 4.17 weight percent of plant stanol ester, which falls within the claimed range.

6. However, *Wester* does not disclose at least 50% (claim 1), 70% (claim 10), or 90% (claim 14) of the breakfast cereal is puffed and/or extruded.

7. *Plank* discloses a food intermediate containing phytosteryl esters (fatty acid derivatives of phytosterols) complex (paragraph [0002]). The complex is added to flour that is then processed to dough (paragraph [0039]). Ready to eat (RTE) cereal pieces, such as CHEERIOS® and WHEATIES®, are formed by using the dough as prepared above (paragraph [0044]). It is well known in the art that CHEERIOS® are formed by extruding and puffing dough.

8. It would have been obvious to a person of ordinary skill in the art at the time the invention was made to prepare the breakfast cereal disclosed by *Wester* by using the method disclosed by *Plank*.

9. One having ordinary skill in the art would have been motivated to do this because *Wester* teaches cereal products, including breakfast cereals, may contain the 0.4% - 10% of plant sterol esters (page 6, lines 2-4 and page 9, lines 9-11). Also, *Wester* and *Plank* teach the presence of plant sterol esters in breakfast cereals. Based upon the fact that the breakfast cereals disclosed by *Wester* and *Plank* are similar, it would have

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been obvious, given the teachings of *Plank*, to use the plant sterol esters disclosed by *Wester* to prepare breakfast cereal using the method disclosed by *Plank* with the expectation of successfully producing puffed and extruded breakfast cereal that lowers cholesterol levels when ingested (page 5, lines 28-30).

10. Regarding claims 2 and 5, the fruit muesli composition mentioned above also contains 6.0g of sugar. As a result, the total composition included 10% sugar by weight, which falls within the claimed range (Example 12, page 20).

11. With respect to claim 3, *Wester* discloses oat bran is present in the muesli (Example 7, page 17 and Example 12, page 20), and bran products may be toasted (page 6, lines 5-6).

12. With regards to claims 6, 12, and 13, *Wester* discloses an example of a cereal product containing β -glucan and stanol fatty acid ester (Example 7, page 17). The muesli mixture consisted of oat flake, fibre-rich oat bran, rye flake, wheat germ, brown sugar, sugar syrup, salt, apple flake, raisin, hazel nut, vegetable fat, and stanol fatty acid ester. The composition has a total mass of 990g, and the weight percent of stanol fatty acid ester present in the composition is about 2% (20g of stanol fatty acid ester was used). Since the stanol fatty acid ester is the only plant sterol ester used in this example, the plant sterol ester comprises 100 percent by weight of stanol fatty acid ester, which falls within the claimed range.

13. Regarding claim 7, *Wester* discloses preferably plant sterol fatty acid esters are incorporated into food. Even more preferred, the plant sterol fatty acid esters contains a substantial amount of stanol fatty acid ester e.g. at least 30% stanol fatty acid ester

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(page 13, lines 2-4). Since *Wester* discloses at least 30% stanol fatty acid esters are present in the plant sterol composition, at most 70% of plant sterol fatty acid is present which falls within the range claimed by the applicant.

14. With respect to claim 8, the fruit muesli composition mentioned above in example 12 also contains 8.3% β -glucan, a soluble fibre, which falls within the claimed range of 3.5 to 60 weight-% of dietary fibre (Example 12, page 20).

15. Regarding claim 9, *Wester* discloses a fruit muesli composition comprising 6.0g of sugar, and the total composition included 10% sugar by weight (Example 12, page 20). However, this particular example does not disclose that the cereal comprises 17.5 to 50 weight-% sugar.

16. In another example, *Wester* discloses a muesli mixture containing β -glucan and stanol fatty acid ester (Example 7, page 17). This mixture contains 170g of sugar (100g brown sugar and 70g of sugar syrup), which is about 17.2% weight of sugar present in the mixture.

17. It would have been obvious to a person of ordinary skill in the art at the time the invention was made to modify the amount of sugar present in example 12. It is also obvious to consider sugar from the fruit as additional sources of sugar.

18. One having ordinary skill in the art would have been motivated to do this because *Wester* teaches various amounts of sugar may be added to the breakfast cereal. Also, the addition of sugar enhances the flavor of the cereal making it more appealing to consume.

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19. It would have also been obvious to a person of ordinary skill in the art at the time the invention was made to incorporate sugar (claims 2, 5, and 9), toasted cereal (claim 3), stanol fatty acid esters (claims 6, 12, and 13), sterol fatty acid esters (claim 7), and dietary fibre (claim 8) disclosed by *Wester* in view of *Plank* into at least 50 weight % of puffed and/or extruded cereal.

20. One having ordinary skill in the art would have been motivated to do this because *Wester* teaches sugar, stanol fatty acid esters, sterol fatty acid esters, toasted cereal, and dietary fibre are present in the fruit muesli, which contains rice crispy cereal pieces (Example 12, page 20 and Example 7, page 17). It is well known in the art that rice crispy cereal pieces are puffed. *Wester* also teaches cereal products, including breakfast cereals comprising various shaped pieces (i.e. extruded and/or puffed) as well as mueslis, may contain the 0.4% - 10% of plant sterol esters and/or plant stanol esters (page 5, lines 3-8; page 6, lines 2-4; and page 9, lines 9-11) and 1-5% β -glucan (a soluble fibre) (page 9, lines 9-11). Therefore it would have been obvious, given the teachings of *Wester*, to incorporate the sugar, stanol fatty acid esters, sterol fatty acid esters, toasted cereal, and dietary fibre into a variety of breakfast cereals, including puffed and extruded cereals as claimed by the applicant, with the expectation of successfully producing a breakfast cereal that lowers cholesterol levels when ingested (page 5, lines 28-30).

Response to Arguments

21. Applicant's arguments filed October 15, 2010 have been fully considered.

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22. Applicant's arguments with respect to the rejection of claims 1-14 over *Wester* have been considered and are persuasive. Therefore, the rejection has been withdrawn.

23. Applicant's arguments with respect to the rejection of claims 1-14 over *Wester* in view of *Plank* have been considered, but they are not persuasive (pages 4-7).

24. Applicant argues one of ordinary skill in the art would not understand that breakfast cereals comprising at least 50 weight % of puffed and/or extruded cereals could have decreased soaking characteristics with the addition of "from 2.2 to 25 weight-% of plant sterol esters. However, the recitation "with decreased soaking after liquid is added" has not been given patentable weight because the recitation occurs in the preamble of independent claims 1 and 11. A preamble is generally not accorded any patentable weight where it merely recites the purpose of a process or the intended use of a structure, and where the body of the claim does not depend on the preamble for completeness but, instead, the process steps or structural limitations are able to stand alone. See *In re Hirao*, 535 F.2d 67, 190 USPQ 15 (CCPA 1976) and *Kropa v. Robie*, 187 F.2d 150, 152, 88 USPQ 478, 481 (CCPA 1951). Further, the claiming of a new use, new function, or unknown property of a prior art composition does not necessarily make the claim patentable (see MPEP 2112). Given that the breakfast cereal of *Wester* in view of *Plank* is substantially identical to that claimed by the applicant, it is expected that the breakfast cereals disclosed by *Wester* and *Wester* in view of *Plank* have decreased soaking after liquid is added, absent any clear and convincing evidence to the contrary.

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25. Applicant also argues Example 12 of *Wester* does not comprise at least 50 weight % puffed and/or extruded cereal. However, *Wester* discloses the fruit muesli contains rice crispy cereal pieces (Example 12, page 20). It is well known in the art that rice crispy cereal pieces are puffed. Even though *Wester* teaches a portion of the muesli in Example 12 is puffed and extruded, *Wester* still teaches the cereal comprises puffed and/or extruded pieces, and various cereal products, including breakfast cereals with various shaped pieces (i.e. extruded and/or puffed) as well as mueslis, may contain the 0.4% - 10% of plant sterol esters (page 6, lines 2-4 and page 9, lines 9-11). Further, *Plank* is relied upon for the teachings of at least 50%, 70% , or 90% of the breakfast cereal is puffed and/or extruded. Based upon the face that *Wester* and *Plank* similarly teach breakfast cereals comprising plant sterol esters, it would have been obvious to prepare the breakfast cereal disclosed by *Wester* with the method of *Plank* with the expectation of successfully preparing a functional product.

26.

Conclusion

27. **THIS ACTION IS MADE FINAL.** Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

28. A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the

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shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of this final action.

29. Any inquiry concerning this communication or earlier communications from the examiner should be directed to TYNESHA MCCLAIN-COLEMAN whose telephone number is (571)270-1153. The examiner can normally be reached on Monday - Thursday 7:30AM - 5:00PM Eastern Time.

30. If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Jennifer McNeil can be reached on (571)272-1540. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

31. Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

/TYNESHA L MCCLAIN-COLEMAN/
Examiner, Art Unit 1789

/Jennifer C McNeil/
Supervisory Patent Examiner, Art Unit 1784